NO. 42306-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROBIN L. CHRISTOMOS, AKA WHITTEN,
Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

Before the Honorable Christine Pomeroy, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-930

TABLE OF AUTHORITIES

A. ASSIGNMENT OF ERROR

1. Defense counsel was ineffective for failing to object to inadmissible, highly prejudicial evidence of appellant's prior bad acts.

B. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

1. Defense counsel failed to object to a deputy sheriff's testimony before a jury that he had had contact with the appellant two weeks before the current incident, that she was "hostile" and that he requested a second unit to respond to the current incident based on his previous contact with her. Did this failure constitute deficient performance that resulted in reversible prejudice?

C. STATEMENT OF THE CASE

1. Procedural facts:

Robin Whitten[1] was charged by information filed in Thurston County Superior Court with one count of assault in the third degree, contrary to RCW 9A.36.031(1)(g). Clerk's Papers (CP) at 6. An amended information was filed June 28, 2011. CP 11.

Ms. Whitten was tried by a jury on June 28, 2011, the Honorable Christine Pomeroy presiding. Neither exceptions nor objections to the jury instructions were taken by counsel for the defense. Report of Proceedings

[1]The appellant is referred to as Robin Whitten in the trial record.

(RP)(Trial) at 56.[2]

The court instructed the jury on voluntary intoxication. Instruction No. 8. CP 57. The jury found her guilty as charged in the amended information. CP 46. On June 29, 2011 she was sentenced as a first time offender. (RP) (Sentencing) at 8; CP 62-59.

Timely notice of appeal was filed on June 29, 2011. CP 70. This appeal follows.

2. Trial testimony:

Robin Whitten called law enforcement late on April 20, 2011 to report that her cell phone had been stolen, and Thurston County Deputy Sheriff Ryan Hoover was dispatched to investigate the report. RP (Trial) at 19. Ms. Whitten lived behind a store on Highway 12 in Rochester, Thurston County, Washington. RP (Trial) at 19. He testified that on the way to the call, he received a call from dispatch regarding an intoxicated female walking down the middle of Highway 12. RP (Trial) at 19. He testified: "I asked Deputy Hovda to respond with me. I had had prior dealings with Ms. Whitten about two weeks prior to that day and she was pretty hostile at that time. So I asked for a second unit to come with me." RP (Trial) at 19.

When Deputy Hoover arrived, Ms. Whitten was sitting on the

[2]The record of proceedings consists of the following:
RP (Hearing) April 25, 2011; RP (Confirmation hearing) June 22, 2011; RP (Trial), June 28, 2011; RP (Sentencing), June 29, 2011.

shoulder of Highway 12. RP (Trial) at 20, 45. Deputy Hoover testified that "[b]ased on my other contact with Ms. Whitten, I approached her in a calm manner." RP (Trial) at 21. She appeared to be highly intoxicated, had a cut above her left eye, and had blood on her face. RP (Trial) at 32, 45. He asked her about the theft of her phone and about the cut on her face, and she responded by screaming and yelling profanities. RP (Trial) at 21. He stated that she balled up her fist and held it out toward his face while swearing. RP (Trial) at 22. The deputy testified that he knew she lived a few blocks away and intended to transport her to her house. RP (Trial) at 22. He tried to get to her to his patrol car with help from a member of the Chehalis Tribal Police, who were also on the scene. RP (Trial) at 22, 23, 37. He stated that as they were walking to his car, she started to tense up and tried to pull away from the officers, so he put her in handcuffs and leaned her against the patrol car. RP (Trial) at 23, 24. He stated that he did not intend to arrest her, but nevertheless he patted her down for weapons prior to transporting her to her house. RP (Trial) at 24. He stated that as he conducted the pat down search, she screamed a profanity and spun around an accused him of touching her breast, which he denied. RP (Trial) at 24, 25. He stated that as she spun around, she kicked out with her right foot, hitting him on his right knee. RP (Trial) at 25. He then forced her onto the ground and told her she was under arrest for assault. RP (Trial) at 26. He continued the search and then put her

in the patrol car. RP (Trial) at 26. She was not seatbelted and leaned back on the seat and kicked the passenger side window with both her feet. RP (Trial) at 26, 42.

During cross examination, the deputy noted that during his contact with Ms. Whitten two weeks prior to the current incident, she had also been intoxicated. RP (Trial) at 31.

Ms. Whitten testified had she had consumed at least two Four Lokos, and a cranberry lemonade alcohol drink given to her by neighbor kids. RP (Trial) at 49. She stated that remembered sitting at the senior community center and then remembered being at the intake at the jail. RP (Trial) at 50. She said that he had never tried Four Loko before, and that "[t]hey took them off the shelf for a while." RP (Trial) at 51.

D. ARGUMENT

1. DEFENSE COUNSEL'S INEFFECTIVE ASSISTANCE DENIED MS. WHITTEN A FAIR TRIAL WHEN COUNSEL FAILED TO OBJECT TO INADMISSIBLE, PREJUDICIAL EVIDENCE

Ms. Whitten's counsel failed to object to an inadmissible prior bad act when Deputy Hoover told jurors he had had contact with Ms. Whitten two weeks before the incident on April 20, 2011, that she was hostile, and that he was sufficiently concerned as to request the assistance of a second officer on

April 20. RP (Trial) at 19. Counsel did not object at trial, did not move in limine to preclude the prejudicial testimony, or after trial move for a mistrial. Because the prejudicial evidence did not pertain to the defense theory of voluntary intoxication, there was no tactical reason for failing to object. Counsel's deficient performance amounted to ineffective assistance of counsel, warranting reversal of Ms. Whitten's conviction.

a. Ms. Whitten has a constitutional right to effective counsel.

Article I, §22 of the Washington Constitution and the Sixth Amendment guarantees criminal defendants effective representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Personal Restraint of Woods*, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). To establish ineffective assistance of counsel, the appellant must show (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A defendant who claims ineffective assistance based on the failure to challenge the admission of evidence must show (1) there were no legitimate strategic or tactical reasons to support the failure; (2) an objection to the

evidence would likely have been sustained, and (3) the admission of the evidence was prejudicial. *McFarland*, 127 Wn.2d at 334-35.

To meet the prejudice prong, the appellant must show that, but for counsel's deficient performance, there is a reasonable probability the verdict would have been different. *State v. West*, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

b. Defense counsel's failure to object to Deputy Hoover's testimony regarding prior contact with Ms. Whitten during which she was "hostile," constituted deficient performance.

Under ER 404(b), evidence of other crimes, wrongs or acts is presumptively inadmissible to prove character and show action in conformity therewith. *State v. Powell*, 126 Wn.2d 244, 258, 898 P.2d 615 (1995).

Here, trial counsel failed to object to, and even elicited, testimony that Deputy Hoover had had contact with Ms. Whitten two weeks prior to the April 20 incident, that she was hostile, and that the prior contact caused the deputy to request a second unit when responding to the report on April 20. This testimony is set forth as follows:

(1) Deputy Hoover testified: "I asked Deputy Hovda to respond

with me. I had had prior dealings with Ms. Whitten about two weeks prior to that day and she was pretty hostile at that time. So I asked for a second unit to come with me." RP (Trial) at 19.

(2) Deputy Hoover testified: "[b]ased on my other contact with Ms. Whitten, I approached her in a calm manner." RP (Trial) at 21.

(3) On cross-examination, defense counsel asked the deputy if Ms. Whitten had been intoxicated during the previous incident, and Deputy Hoover stated that she was. RP (Trial) at 31.

From the deputy's testimony, a reasonable juror could infer Ms. Whitten had been arrested in the past for criminal activity. Evidence of prior misconduct is admissible to prove identity, only if identity is actually at issue. In addition, to be admissible under ER 404(b), the prior misconduct must link the defendant to the crime charged. *State v. Sanford*, 128 Wn. App. 280, 286, 115 P.3d 368 (2005). Here, identity was not at issue and the testimony regarding the prior incident did to link Ms. Whitten to the current offense.

ER 404 states, in part:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Under ER 404(b), evidence of other crimes, wrongs or acts is presumptively inadmissible to prove character and show action in conformity therewith. *State v. Powell*, 126 Wn.2d 244, 258, 898 P.2d 615 (1995). To support the admission of prior acts under ER 404(b), the proponent must show the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) has probative value that outweighs its prejudicial effect. *State v. Magers*, 164 Wn.2d 174, 184, 189 P.3d 126 (2008). Evidence of prior misconduct "is inadmissible to show that the defendant is a dangerous person or a `criminal type' and is thus likely to have committed the crime for which [the defendant] is presently charged." *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002), citing 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBROOK ON WASHINGTON EVIDENCE, author's comment (3), at 207 (2002). The prior contact did not connect Ms. Whitten with the alleged assault. Moreover, the testimony would lead jurors to conclude that Ms. Whitten was a "criminal type" who was hostile and would be likely to get drunk and assault police officers. Therefore, Deputy Hoover's remark was not admissible under ER 404(b).

c. Because the previous incident was inadmissible under ER 404(b), the trial court would likely have sustained an objection.

Counsel's failure to object to Deputy Hoover's testimony constituted deficient performance. A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Counsel's deficient performance likely affected the outcome at trial. Had counsel objected, the court would have excluded the evidence under ER 404(b) because it was unfairly prejudicial propensity evidence.

Counsel could have had no reasonable tactical or strategic reason for permitting jurors to consider the evidence. The defense theory was that Ms. Whitten was voluntarily intoxicated and could not form the requisite intent to commit assault. RP (Trial) at 78-80. Evidence that Deputy Hoover had had prior contact with her in which she was intoxicated and hostile, and that the deputy thought a backup unit was necessary undermines the theory. The evidence invited jurors to speculate that Ms. Whitten was known to police as an angry troublemaker who had no respect for police and was likely to have intentionally kicked the deputy. Therefore, there was no legitimate tactical reason for failing to object to Deputy Hoover's testimony.

d. Ms. Whitten was prejudiced by counsel's deficient performance.

It is reasonably probable the verdict would have been different absent evidence that Ms. Whitten was known to the deputy as someone who was hostile to police and that Deputy Hoover thought an additional police unit was required to respond to her call. Ms. Whitten has therefore shown (1) counsel's failure to object to Deputy Hoover's 'prior contact' testimony was deficient performance and (2) the subpar performance resulted in prejudice to Ms. Whitten.

E. CONCLUSION

This Court should reverse Ms. Whitten's conviction because ineffective assistance of counsel denied her a fair trial.

DATED: December 8, 2011.

Respectfully submitted,
THE TILLER LAW FIRM

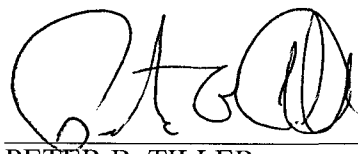
PETER B. TILLER-WSBA 20835
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on December 8, 2011, that this Opening Brief was mailed by U.S. mail, postage prepaid, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid to Mr. John Skinder, Thurston County Prosecutor's Office, 2000 Lakeridge Dr. SW, Bldg. 2, Olympia, WA 98502, to the appellant, Robin L. Whitten,

c/o Capital Clubhouse, 522 Franklin St. SE, Olympia, WA 98501, true and correct copies of this Brief.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 8, 2011.



PETER B. TILLER

EXHIBIT A

STATUTES

RCW 9a.36.031

Assault in the third degree.

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or

(c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(e) Assaults a firefighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

(h) Assaults a peace officer with a projectile stun gun; or

(i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: "Nurse" means a person licensed under chapter 18.79 RCW; "physician" means a person licensed under chapter 18.57 or 18.71 RCW; and "health care provider" means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW; or

(j) Assaults a judicial officer, court-related employee, county clerk, or county clerk's employee, while that person is performing his or her official duties at the time of the assault or as a result of that person's employment within the judicial system. For purposes of this subsection, "court-related employee" includes bailiffs, court reporters, judicial assistants, court managers, court managers' employees, and any other employee, regardless of title, who is engaged in equivalent functions.

(2) Assault in the third degree is a class C felony.